In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1153

D. LOUIS ABOOD, et al.,
Appellants,

vs.

DETROIT BOARD OF EDUCATION, et al.,
Appellees.

CHRISTINE WARCZAK, et al.,
Appellants,

vs.

DETROIT BOARD OF EDUCATION, et al.,
Appellees.

On Appeal from the Court of Appeals of Michigan

BRIEF OF PACIFIC LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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OPINION BELOW

The Michigan Court of Appeals in an opinion reported at 60 Mich. App. 92, 230 N.W.2d 322 (1975),

held that Mich. Stat. Ann. § 17.455(10), Mich. Comp. Laws § 423.210, which allows negotiation of agency shop provisions in public employer-employee collective bargaining contracts, does not violate the First or Fifth Amendment rights of workers insofar as they are forced to support collective bargaining activities of the union. However, it indicated that forced financial support of union activities for purposes other than collective bargaining could violate the First and Fourteenth Amendment rights of public employees.

INTEREST OF AMICUS

Pacific Legal Foundation (hereinafter PLF) is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens. Twelve of the seventeen-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Board has authorized the filing of a brief *amicus curiae* in support of petition for writ of certiorari in this case.

PLF considers this case to be of special significance in that it presents this Court with questions regarding the constitutional rights of the rapidly increasing number of our nation's citizens who have chosen a career in public service. Numerous state legislatures,

including that of California, have recently passed statutes regarding the organizational rights of these workers, similar to the Michigan law which is challenged in this proceeding. California Government Code §§ 3540, *et seq.* PLF believes it is in the general interest that these laws be construed and limited by this Court to protect the rights of association and expression of *all* public employees.

Pursuant to Supreme Court Rule 42, this brief is filed with the written consent of all parties, which consents have been filed with the Clerk of the Court.

INTRODUCTION

Section 10 of the Michigan Public Employment Relations Act (hereinafter PERA) permits a public employer to make "an agreement with an exclusive bargaining representative [of the employees] . . . to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." Mich. Stat. Ann. § 17.455(10), Mich. Comp. Laws § 423.210. This statutory authorization of an "agency shop" does not allow the exclusive bargaining representative, the union, to require union membership. However, this Court has ruled in cases construing a portion of The National Labor Relations Act, 29 U.S.C. § 158, that the agency shop is the functional equivalent of the union shop which requires union

membership as a condition of employment. This is so because all that can be lawfully required under a union shop security agreement is the payment of dues to the union by the employees and this payment of fees is exactly what is required in agency shop agreements. *NLRB v. General Motors Corp.,* 373 U.S. 734, 743 (1963). Further, employees working under a contract which requires payment of union dues, but not union membership, are nonetheless indirectly compelled to join the union since only active membership can assure them a voice in the organization in which their money is spent.

ARGUMENT

THE MICHIGAN STATUTE AUTHORIZING STATE AGENCIES TO COMPEL PUBLIC EMPLOYEES TO PAY A SERVICE FEE WHICH IS THE EQUIVALENT OF UNION DUES AS A CONDITION OF EMPLOYMENT VIOLATES THE RIGHT OF ASSOCIATION OF EMPLOYEES WHO DO NOT DESIRE TO SUPPORT THE UNION.

A. Freedom from compelled association

This Court has long recognized the freedom of association as part of the fundamental right of expression guaranteed by the First and Fourteenth Amendments of the Constitution. *NAACP v. Alabama,* 357 U.S. 449, 460 (1958). This freedom includes the right to lend financial support to an organization. *Buckley v. Valeo,* ..... U.S. ....., 46 L. Ed. 2d 659 (1976). Just as the rights to express oneself and to associate are protected by the Constitution, so is the freedom from compelled expression and the right not to associate.

This was recognized by this Court in *Kusper v. Pontikes,* 414 U.S. 51 (1973), which held unconstitutional an Illinois law which prohibited a person from voting in a primary election of a political party if he had voted in the primary of another party during the preceding 23 months. In *Pontikes, supra* at 57, this Court found that one of the significant evils of the statute was to " 'lock' the voter into his preexisting party affiliation," thus compelling an association he did not desire.

As an indispensable basis for freedom of association, the First Amendment, applicable to the states through the Fourteenth Amendment, guarantees "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." United States Constitution, Amendment 1. Yet, Section 10 of PERA authorizes the public employer to make an agreement with the union as exclusive bargaining agent to require, as a condition of employment, the payment of a service fee equivalent to the amount of union dues. The recognition of an exclusive bargaining agent deprives nonunion members of their right to petition the government for redress of grievances—only the exclusive bargaining agent, which is in no way responsive to the control of nonunion members, can deal with the government employer.

PERA adds insult to injury in first stripping the nonunion teacher of his right to petition the government employer and then requiring him to finance this deprivation of his freedom to speak, associate,

and petition. If the teacher refuses to pay, his employment is terminated. In *Pickering v. Board of Education,* 391 U.S. 563 (1968), this Court addressed the question whether a teacher could be fired for speaking out on school administration. This Court there said:

> "To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court." *Id.* at 568 (citations omitted).

Pickering concerned freedom to raise the issue of the obtaining and use of public school funds, a subject which under PERA may only be addressed by the union selected as exclusive bargaining agent. Yet this Court declared in *Pickering*:

> "More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.* at 571-572.

The present case presents a turn for the worse from the *Pickering* facts. Not only are the nonunion teachers forbidden from contributing to the decision making process of their employers their "informed and definite opinions as to how funds allotted to the operation of the schools should be spent," they are forced to expend their own resources to finance the very instrument which muzzles them.

B. The distinction between union dues required as a condition of public employment and those required as a condition of private employment

In *Railway Employees' Department v. Hanson,* 351 U.S. 225 (1956), this Court upheld the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.,* which permitted a "union shop" security agreement in collective bargaining contracts between railroads and their employees. *Hanson* dealt only with private employment and explicitly did no more than to uphold government *authorization* of compelled payment of union dues.

The situation presented to the Court by the Railway Labor Act in *Hanson* can be distinguished in numerous respects from the present case involving the Michigan Public Employment Relations Act. Perhaps the most striking difference is that the Railway Labor Act merely allowed private parties to negotiate a contract which mandated a union shop. PERA allows the state government itself to compel payment of fees to a union by entering into a collective bargaining contract which includes an agency shop clause.

This compulsion by the state is what lower courts have abhorred. In *Bond v. County of Delaware,* 368 F. Supp. 618 (E.D. Pa. 1973), a district court declared that state action requiring a public employee to financially support the Republican Party would be a denial of his right of association. In *Illinois State Employees Union, Council 34, Etc. v. Lewis,* 473 F.2d 561 (7th Cir. 1972), *cert. denied* 410 U.S. 928 (1973), the Seventh Circuit Court of Appeals held that a state employee could not be discharged because he refused to join or support the Republican Party. Again in *West Virginia State Board of Education v. Barnette,* 319 U.S. 643 (1943), this Court held that state compulsion of the flag salute violated an individual's First Amendment freedom of expression.

Since this Court's holdings in *Perry v. Sindermann,* 408 U.S. 593 (1972), and *Board of Regents v. Roth,* 408 U.S. 564 (1972), it has been decided that a state may not deny public employment for reasons which violate a worker's constitutional rights. When a state agency, pursuant to PERA, negotiates a contract which compels union support by public employees, such a violation occurs.

Railway Employees' Department v. Hanson, supra at 235 and 238, upheld only compulsory assessment of fees for collective bargaining costs in private industry. It did not decide whether use of these fees for political purposes would violate the First Amendment rights of employees who joined the union only to keep their jobs. This was clearly recognized by this Court in *International Association of Machinists v. Street,* 367 U.S. 740, 746-750 (1961), which raised but did not decide this constitutional issue.

While *Street* avoided the constitutional question by statutory construction, the case has clear constitutional overtones. *McNamara v. Johnston,* 360 F.Supp. 517 (N.D. Ill. 1973). In *Street,* both Justice Douglas (concurring at 775-779) and Justice Black (dissenting at 780-791) agreed that the First Amendment would indeed be violated if the union used funds received from coerced employees to support political purposes they opposed.

> "Compelling a man by law to pay his money to elect candidates or advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by law to speak for a candidate, a party, or a cause he is against. The very reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands." (Black, J., dissenting at 788.)

Application of this view to the situation of a public employee, who, under PERA, must pay union dues to keep his job, clearly indicates a First Amendment violation since collective bargaining in public employment is by nature a political process.

Collective bargaining works in the private sector because of the demands of competition on the employer. The competitive factor inhibits the private employer from yielding to those demands of the union which by reason of their cost factor will price his product out of the competitive market. Balancing

this restraint, however, is the knowledge that if the employer resists reasonable demands by the union, a strike will probably be called and the loss of his labor force will then place the employer in a situation in which he cannot profitably compete. These countervailing forces generally require the employer and the union to strike a rough equilibrium grounded on economic pragmatism.

The factor of economic competition is almost entirely absent in the public sector. In public employment, the union must bargain with representatives of the government. The success of the union often will depend not solely on economic factors, but on political decisions regarding budget approval and tax allocations made by other legislative and executive officials quite apart from the bargaining process. *See Blair, Union Security Agreements in Public Employment,* 60 Cornell L. R. 183 (1975).

Hence, to assure a favorable position at the bargaining table, it may well be necessary for the union to engage in intense political activity such as lobbying and support of candidates before bargaining is begun. This type of activity may ultimately affect the bargaining process, but also reaches far beyond this confined area. Political candidates and positions which the union may deem favorable to it in the area of employee relations may also represent views which coerced employees find objectionable in numerous other areas.

In compelling union support, state officials who negotiate an agency shop contract pursuant to PERA

are clearly directly compelling political associations of dissenting employees by way of financial assistance for a range of activities far beyond those necessary for traditional collective bargaining in private employment.

Less directly, but no less meaningfully, when the public employee is asked to contribute to the political coffers of the union, he is being deprived of funds with which he could make his voice heard in causes of his own choosing. Further, in being asked financially to support causes to which he may be diametrically opposed, he is not being asked merely to keep his own views to himself, but to strengthen opposition which may work to defeat the causes he espouses. These barriers to political expression which PERA puts in the way of dissenting employees are particularly onerous in light of the view of this Court that the major purpose of the First Amendment is to protect freedoms in the political area. *Mills v. Alabama,* 384 U.S. 214, 218-219 (1966).

It is recognized that even the fundamental rights of association and expression are not absolute and when these constitutional guarantees are asserted against the exercise of governmental powers, it is necessary for the courts to engage in a "balancing" process. This involves an "approximate weighing" of the rights of individuals whose liberties are threatened against the interests which the state asserts are served by the deprivation of rights. *Konigsberg v. State Bar of California,* 366 U.S. 36, 51 (1962).

However, this Court has ruled that when the state attempts to interfere with the fundamental First Amendment liberties, it must show a compelling state interest for such interference. A mere rational connection between the state action and the interest it seeks to serve or the evil it wishes to curb by the restriction of fundamental rights is not enough. *Thomas v. Collins,* 323 U.S. 516 (1945); *DeGregory v. Attorney General of the State of New Hampshire,* 383 U.S. 825 (1966). Thus during the "balancing" process, the scales are, at the onset, weighted heavily in favor of upholding the rights of the individual and against the restrictive action of the state. Further, as this Court has ruled in *Thomas v. Collins, supra* at 530, "[I]t is the character of the right, not the limitation, which determines . . . the choice" of the compelling state interest standard. Therefore, even a small intrusion into individual liberties must be justified by a compelling state interest.

This Court in *Railway Employees' Department v. Hanson* decided that, on the facts of that case, no valid First Amendment claims were presented. Therefore, it did not engage in the balancing test and decided that the union shop challenged therein served a legitimate objective and was rationally related to serving the state interest of facilitating interstate commerce. *Id.* at 233.

However, the differences between the state's role under PERA and the political nature of collective bargaining in the public sector give the appellants' First Amendment claims strength in areas in which

this Court could have found the private employees' claim deficient. Therefore, this Court must conduct the balancing dictated by *Konigsberg v. State Bar of California, supra,* and require that appellees prove a "compelling state interest" as required in *Thomas v. Collins, supra,* and *DeGregory v. Attorney General of the State of New Hampshire, supra.*

It is clear that even a slight infringement of fundamental rights such as those of association will trigger the need for a compelling state interest to justify it. *Thomas v. Collins, supra.* However, in the case at bar the infringement of the freedom of association caused by the state compulsion of employees to support the union inherent in PERA is not slight.

As discussed, *supra,* compelled support of public employee collective bargaining involves compelled support of an entire political program, thus striking at the very core of the purpose of the First Amendment. Further, public employees in all states already have their political activities somewhat restricted by "little Hatch Acts." These acts are cited in footnote 2 in *Broadrick v. Oklahoma,* 413 U.S. 601, 604 (1973), in which this Court upheld the constitutionality of such acts.

The additional burden of forced contribution to a union which may be used to further objectionable candidates and positions goes a great distance in completely silencing the political voice of the public employee. While these "little Hatch Acts" prevent him from becoming as active as he may wish on behalf of candidates he supports, compelled contri-

bution to a union supporting opposing positions deprives him of financial resources to further his beliefs, while increasing the strength of the opposition by these same financial contributions.

In *Shelton v. Tucker,* 364 U.S. 479 (1960), this Court singled out teachers, the appellants in the case at bar, as a group whose associational rights must be particularly protected:

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. 'By limiting the power of the States to interfere with the freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. . . .'" *Id.* at 487 (citation omitted).

Thus this Court has recognized the greater weight which must be given to the individual rights of at least one segment of the public employment sector. This, of course, is necessary if all freedoms are to be bolstered by an effective system of public education.

Against these very important individual interests asserted by appellants, the Court must balance the compelling state interest asserted by appellees in support of the infringement of the individual's rights.

It is clearly the duty of those supporting the restriction to convince this Court that a compelling state interest exists. *Dunn v. Blumstein,* 405 U.S. 330, 342-343 (1972). However, compelling state interests may well be served by a finding that compulsory support of public employee unions is unconstitutional.

It is of vital importance that public employees, teachers in particular, have the fullest possible freedom to explore all avenues of thought and association in order to serve the optimal educational function. While this Court has not held that public education itself is a constitutional right, it has recognized the grave significance of education to our democratic society. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 30 (1973). It follows without question that compelling state interests are served by allowing teachers all possible opportunities to increase their effectiveness. These opportunities can only be hindered by compelling certain forms of association and preventing others that are lawfully acceptable.

The compelling state interest test examined in *Dunn v. Blumstein, supra,* however, cannot be met merely because those seeking to support a restriction on constitutional freedoms can demonstrate that an important state interest is served by the restrictive action. It must also be shown that the state has used the least drastic method of infringing upon individual liberties to serve this interest. *Shelton v. Tucker, supra* at 488.

Justice Douglas, concurring in *International Association of Machinists v. Street, supra* at 776, elo-

quently reaffirmed this requirement when speaking of compelled union association in the private employment sector:

> "Once an association with others is compelled by the facts of life, special safeguards are necessary lest the spirit of the First, Fourth and Fifth Amendments be lost and we all succumb to regimentation. . . . If an association is compelled, the individual should not be forced to surrender any matters of conscience, belief or expression. He should be allowed to enter the group with his own flag flying . . . nothing that the group does should deprive him of the privilege of preserving and expressing his agreement, disagreement, or dissent . . . and he should not be required to finance the promotion of causes with which he disagrees."

As it now reads, PERA does not meet the requirements of this Court in *Shelton v. Tucker, supra,* or those of Justice Douglas in *Street, supra.* It allows payment to the union of "a service fee equivalent to the amount of dues uniformly required of members. . . ." PERA § 10. No distinction is made between payment for support of collective bargaining and that for support of union activities beyond this sphere. In order not to offend the political freedoms which this Court has recognized as being of primary importance in *Mills v. Alabama, supra,* and as the Michigan Court of Appeals recognized below, the statute also would be defective to the extent it permits compulsion of payment for other than very narrowly defined union activities in the sphere of employment contract negotiation and administration.

CONCLUSION

For the reasons stated above, the decision of the Michigan Court of Appeals should be reversed insofar as it authorizes involuntary payments of agency shop service fees by nonunion public employees.

Respectfully submitted,

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